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No. 72-850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

VIRGINIA MANNING, *et al.*, *Petitioners,*

vs.

GENERAL MOTORS CORPORATION, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR GENERAL MOTORS CORPORATION IN OPPOSITION

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Reports Of Opinions

The opinion of the Sixth Circuit Court of Appeals is reported *sub. nom. Manning* v. *International Union, etc.* at 466 F.2d 812. It has also been reported at 5 EPD, Paragraph 7964 (CCH) and at 4 FEP Cases 1282.

The decision of the District Court, the United States District Court for the Northern District of Ohio, Western Division, has not been reported in the Federal Supplement, but was reported at 3 EPD, Paragraph 8325 and at 3 FEP Cases 968.

The decision of the Court of Appeals is annexed to the Petition herein as Appendix A. The decision of the District Court is annexed to the Petition herein as Appendix

B, and the order of the District Court is annexed to the Petition as Appendix C.

Jurisdiction Of The Court

The jurisdictional requisites for filing a petition for certiorari are adequately set forth in the Petition. Respondent denies that the Petition presents any of the grounds required by Rule 19-1(b) of this Court for the granting of a writ of certiorari.

However, to the extent that compliance with Supreme Court Rule 21, paragraph 4 is jurisdictional, the Proof of Service of the Petition filed by Petitioner fails to disclose service of copies of the Petition upon representatives of the State of Ohio who were parties in both the District Court and the Court of Appeals.

Question Presented For Review

The Petition raises the question whether or not the Court of Appeals erred in holding that the District Court did not abuse its discretion under Section 706(g) of the Civil Rights Act of 1964, quoted infra page 3, by refusing to award back pay under circumstances where (1) the employer acted in good faith reliance upon the 1965 Guidelines of the Equal Employment Opportunity Commission (herein after EEOC) in following the Ohio "female protective statutes," (2) took reasonable steps to resolve the dilemma in which the employer found itself when the EEOC reversed itself and changed its Guidelines effective August 19, 1969, to state that such state "female protective statutes" were in conflict with Title VII of the Civil Rights Act of 1964, and (3) thereafter the employer voluntarily ceased compliance with said Ohio statutes effective May 1, 1970.

This is essentially the same question presented in *LeBlanc* v. *Southern Bell Telephone & Telegraph Co.*, 462 F.2d 1228 (C.A.S., 1972), *cert. denied*, Nov. 6, 1972, No. 72-295 in which certiorari was denied November 6. 1972.

Statutes Involved

Page 3 of the Petition sets forth Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) as a statute involved herein. For ease in reference, that section reads as follows:

> "(g) If the Court finds that the respondent has intionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the Court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . ."

The specific finding of the District Court which was affirmed by the Sixth Circuit Court of Appeals was that General Motors relied in good faith upon the Guidelines of the EEOC in continuing to comply with the Ohio "female protective statutes." This fact makes the provisions of Section 713(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-12(b) applicable to the question presented here. That Section provides:

> "(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good

faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by a judicial authority not to be in conformity with the requirements of this title."

Ohio Revised Code, Sections 4107.42, 4107.43, 4107.46, and 4107.99, the pertinent provisions of the Ohio female protective laws, appear in the Appendix to this brief. (Appendix, pages 29-34) Also included in the Appendix are the 1965 and 1969 Guidelines of the EEOC. (Appendix, pages 17-29)

Statement Of The Case

Petitioners are female employes at the Sandusky, Ohio plant of General Motors Corporation. A charge dated December 30, 1966, was filed by the named petitioner, Virginia Manning, under Title VII of the Civil Rights Act of 1964 with the EEOC claiming that General Motors Corporation discriminated against her because of her sex. Petitioner commenced the instant suit after receiving a notice of right-to-sue from EEOC.

In December 1965, the EEOC published its initial Guidelines on Discrimination Because of Sex. 30 Fed. Reg. 14926-14928. (Appendix, pages 17-27) These Guidelines were declared to be interpretations of the EEOC pursuant to Section 713(b), 42 U.S.C. § 2000e—12(b), quoted supra, page 4. Section 1604.1(c) of these Guidelines provided, in essence, that state limitations on employment of females would provide a basis for application of the bona fide occupational qualification exemption provided in the Civil Rights Act and that an employer would not be considered to be engaged in an unlawful employment practice when he refused to employ females in jobs in which they were legally prohibited from being employed.

In reliance upon these Guidelines, General Motors continued its long established practice of complying with the female protective laws of Ohio. The Ohio female protective statutes, which had been upheld by this Court in *Hawley* v. *Walker*, 232 U.S. 718 (1914), restricted the hours per day, the number of days per week, the number of hours per week, types of occupations and the amount of weight lifting which could be required by female employes, and provided criminal punishment of fine or imprisonment or both for their violation. (Appendix, pages 29-34)

Without any change in its Guidelines, in May 1969, the EEOC forwarded to General Motors its decision dated March 28, 1969, on the charges of Petitioner and others, holding that obedience by General Motors to state law constituted a violation of Title VII. In an earlier decision by the EEOC involving an employe at another Ohio plant of General Motors Corporation, the EEOC had refused to find that adherence to Ohio law violated Title VII.

On August 19, 1969, more than four years after the effective date of Title VII, the EEOC issued new Guide-

lines in which it concluded for the first time that state female protective legislation violated Title VII. 34 Fed. Reg. 13367-13368. (Appendix, pages 27-29)

On October 22, 1969, before this action was filed, General Motors Corporation and the UAW jointly wrote to the Director of the Department of Industrial Relations of the State of Ohio, the official charged with enforcement of the Ohio protective legislation, requesting that an opinion be obtained from the Ohio Attorney General concerning the continuing validity of the Ohio female protective statutes in light of the amended EEOC Guidelines. In November, 1969, after this suit was filed, the Director replied stating that he would not request an opinion from the Attorney General since his department had ceased enforcing the statutes following the EEOC Guideline change. However, he also warned that local law enforcement officials might still seek to enforce those statutes. The State of Ohio resumed enforcement of those statutes in September, 1970.

General Motors continued to give careful attention to this matter. On December 31, 1969, the Attorney General for the State of Michigan ruled that the Michigan female protective laws were invalid. In view of this ruling which affected large numbers of General Motors employes at its Michigan operations, and in light of developing case authority, General Motors, on May 1, 1970, voluntarily ceased compliance with the Ohio female protective laws.

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), its Local 913, and the appropriate enforcement officials of the State of Ohio were also parties in the lower courts.

The District Court issued its opinion on August 19, 1971, holding that the state statutes were pre-empted by Title

VII, but that no back pay should be awarded to the claimants inasmuch as obedience by General Motors to Ohio law was in good faith reliance upon the interpretations of the EEOC in its Guidelines and that General Motors Corporation took reasonable steps to resolve its dilemma when the EEOC changed its Guidelines.

The Sixth Circuit Court of Appeals affirmed the District Court, holding that the District Court did not abuse its discretion in refusing to award back pay inasmuch as there had been no prior judicial interpretations of the validity of the Ohio laws. *Jones Metal Products Co.* v. *Walker*, 29 Ohio St.2d 173, 281 N.E.2d 1 (1972), declaring the Ohio statutes in conflict with Title VII, was not decided until some six months after the decision of the District Court in this case. The Ohio Court of Appeals had earlier held in the *Jones Metal* case at 25 Ohio App.2d 141, 267 N.E.2d 814 (1971), that the Ohio statutes did not conflict with Title VII. Furthermore the EEOC had not taken a definitive stand with respect to the relationship between Title VII and such state protective legislation until two months before this suit was filed and nearly three years after the events complained of had occurred.

Reasons For Denying The Writ

1. Certiorari Should Not Be Granted Because This Is Not An Appropriate Issue For Supreme Court Decision.

Petitioner is, in effect, requesting this Court to review the record to determine whether under the particular facts of this case the District Court abused its discretion by refusing to award back pay. The Sixth Circuit has done so and found no abuse of discretion. Rather than establishing a proposition generally applicable to all Title VII cases

that damages should not be awarded as contended by Petitioner, the decision of the Sixth Circuit was limited to the holding that "[u]nder all the circumstances of this case we cannot conclude that the District Judge abused his discretion in denying back pay to these plaintiffs." (Appendix to Petition, p. 18). Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) requires that if the District Court finds an intentional violation, only then "the court *may* enjoin . . . and order such affirmative action as *may* be appropriate, which *may* include reinstatement or hiring of employees, with or without back pay . . . ." (Emphasis added) Thus, the Congressional intent as expressed by the language used clearly was to grant the District Court wide discretion to fashion appropriate relief. If this Court were to review every case presenting only a question of abuse of discretion by a trial court, it would quickly be overwhelmed by the deluge of cases which would result.

2. Certiorari Should Not Be Granted Because All Parties To The Proceedings In The Lower Courts Have Not Been Made Respondents.

It appears from the Petition that only General Motors is made a respondent. The Proof of Service filed by petitioner fails to disclose any service upon the officials of the State of Ohio who were parties in the lower courts as required by paragraph 4 of Rule 21 of this Court. Petitioner has not filed nor served upon the other parties a written notice that "one or more of the parties below have no interest in the outcome of the petition" as required by Rule 21.

The Ohio officials appealed from the District Court's holding that the Ohio protective statutes were superseded by Title VII, but following the decision of the Ohio Supreme Court in *Jones Metal Products* v. *Walker*, 29 Ohio St.2d

173, 281 N.E.2d 1 (1972), they moved the Sixth Circuit for leave to withdraw their appeal and to be dismissed as parties. The Sixth Circuit permitted only the withdrawal of their appeal, and therefore the Ohio officials are still parties who are required to be served under Rule 21 in the absence of the notice provided for in the Rule.

Without all parties before it, this Court should deny the Petition.

3. There Is No Conflict Between The Decision Of The Court Of Appeals In The Instant Case And The Decision Of The Ninth Circuit In *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (1972).

As her primary reason in support of her Petition, petitioner has alleged a conflict between the decision in the instant case and the decision of the Ninth Circuit in the *Schaeffer* case (a copy of which is Appendix D to the Petition). In doing so, she has used almost the identical language of the petitioner in *LeBlanc* v. *Southern Bell Telephone & Telegraph Co.*, 462 F.2d 1228 (C.A.S., 1972), *cert. denied*, Nov. 6, 1972, No. 72-295 in which certiorari was denied on November 6, 1972. The decision of the Fifth Circuit in *LeBlanc* is reported at 460 F.2d 1228 (1972).

The instant case is much closer to the *LeBlanc* case than to the *Schaeffer* case. Perhaps the most significant distinction between the instant case and *LeBlanc* on the one hand, and *Schaeffer* on the other, is found in the rulings of the respective courts on good faith reliance upon state statutes. In *Schaeffer* the court found that after another case had declared the statute relied upon invalid, continued obedience to that statute was not in good faith (462 F.2d at 1007; Appendix to Petition, p. 55). On the other hand,

the court in *LeBlanc* specifically found good faith on the part of the employer on the facts present in that case. In the instant case the court not only found good faith reliance by General Motors on the Ohio statutes, but also found that General Motors relied in good faith upon the 1965 Guidelines of EEOC. In the instant case the District Court, whose decision was specifically affirmed by the Sixth Circuit, made the following specific findings:

> ". . . the Court further having found that General Motors was in good faith in its reliance upon the mandate of such Ohio protective legislation and the initial Guidelines issued by the Equal Employment Opportunity Commission up to May 1, 1970, when General Motors Corporation ceased its compliance with the Ohio female protective legislation. . . ." (Petition, p. 44).

The Court further held:

> "FURTHER ORDERED that General Motors was in good faith relying upon the Guidelines of the Equal Employment Opportunity Commission which were in effect prior to August 19, 1969. . . ." (Petition, p. 44).

The order of the trial court also contained the following:

> ". . . General Motors Corporation in good faith relied upon the complied with said Ohio female protective legislation and the initial Equal Employment Opportunity Commission Guidelines. . . ." (Petition, p. 45).

While not specifically relied on by the lower courts, the findings made by the District Court and affirmed by the Sixth Circuit make applicable to the instant case the provisions of Section 713(b) of the Civil Rights Act, quoted

supra page 4. That Section, in light of the findings made by the lower courts, serves to relieve General Motors of any liability in the instant case because of its reliance upon EEOC Guidelines. Thus, the instant case provides even stronger support for the denial of back pay than did *LeBlanc* in which certiorari was denied inasmuch as there were no findings in *LeBlanc* relative to reliance on the EEOC Guidelines.

Schaeffer is further distinguishable from the instant case in that there had been a prior judicial determination of the invalidity of the very statute relied upon by the employer. In the instant case, as in *LeBlanc*, however, there had been no such prior determination of the invalidity of the Ohio protective statutes. Indeed, while the instant case was pending, the Ohio Court of Appeals held in *Jones Metal Products* v. *Walker*, 25 Ohio App.2d 141, 267 N.E.2d 814 (1971) that there was no conflict between the Ohio statutes and Title VII. While *Jones Metal* was reversed by the Ohio Supreme Court at 29 Ohio St.2d 173, 281 N.E.2d 1 (1972), such reversal did not come until six months after the decision of the District Court herein.

Furthermore, there is no conflict between *Schaeffer* and the instant case in view of the fact that the Ninth Circuit specifically refused to lay down a rule applicable to all cases and limited its decision to the particular facts of the case before it, stating:

> "Rather than drawing any hard and fast rule concerning the defense of good faith reliance on a state statute, we believe that in each case the merits of the plaintiff's claim and the public policy behind it must be balanced against the hardship on a good-faith employer." (462 F.2d at 1007; Petition, p. 54).

In the instant case, the Sixth Circuit limited its holding to those facts particularly applicable to General Motors when it stated:

> "Under all the circumstances of this case we cannot conclude that the District Judge abused his discretion in denying back pay to these plaintiffs."
> (466 F.2d 816; Petition, p. 18).

Thus, each court limited itself to the specific case before it rather than attempting to phrase a general rule of law applicable to all cases. Under such circumstances, there can be no conflict between the decisions.

At page 9 of her Petition, Petitioner suggests a possible conflict with *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (C.A. 7, 1969). As the Sixth Circuit pointed out in its decision herein, the *Bowe* case "involved no statute and related to a company-imposed weight limitation for female employees." (466 F.2d 815; Petition, p. 17). Thus, there was no federal-state dilemma present in *Bowe* as there is in the instant case.

4. Certiorari Should Be Denied Because There Is No Question Of Continuing General Interest To Be Resolved.

Originally the EEOC Guidelines supported the validity of state female protective legislation. (See comment in *Schaeffer* at 462 F.2d 1007, footnote 3; Petition, p. 54). These Guidelines provided that they were written interpretations of the EEOC as provided for in Section 713(b), 42 U.S.C. § 2000e-12(b) quoted supra page 4. It was not until it amended its Guidelines effective August 19, 1969, that the EEOC issued its written interpretation that state female protective statutes conflicted with Title VII. The vacillation and hesitancy of the EEOC on the state statute

question are detailed in an article by Richard K. Berg, former Deputy General Counsel and Acting General Counsel for the EEOC, entitled "Title VII: A Three Years View" in 44 Notre Dame Lawyer 311 (1969).

However, once the EEOC took a firm stand against state female protective laws in 1969, numerous decisions of state and federal courts and also Attorney General rulings have not hesitated to strike down such protective laws. As a result, the issue which petitioner attempts to raise is of a transitory nature, and it is highly improbable that a similar case could arise in the future. Therefore, any decision in this case would be highly unlikely to affect future court decisions or future action by either employers or employes inasmuch as most, if not all, cases in which this question could have any bearing have already been concluded.

Petitioner claims that General Motors should have affirmatively sought a ruling from the EEOC under Section 713(b), 42 U.S.C. Section 2000e-12(b). In making such an assertion petitioner ignores the fact that the EEOC Guidelines themselves upon which General Motors was found to have relied stated that they were such an interpretation under that section. Moreover, the discrimination charge filed by petitioner with the EEOC was pending before the EEOC for more than two years prior to the decision of the EEOC. Under these circumstances, General Motors or any other employer had no reason to believe that a request for an interpretation would have been acted upon by the EEOC any more speedily or promptly than the discrimination charge filed by petitioner or would be different than the published Guidelines.

This Court has frequently said that the interpretations of the agency charged with administration of a particular

statute are entitled to great deference. *E.g., Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34, 91 S. Ct. 849, 28 L. Ed.2d 158 (1971). However, when the agency charged with the administration and enforcement of an Act cannot make up its own mind on an issue, it is unreasonable to expect private litigants subject to that Act to resolve the dilemma which the hesitation and vacillation of that agency has created. This is particularly true where, as here, the Guidelines in effect prior to August, 1969, stated affirmatively that compliance with state statutes would not be a violation of Title VII.

It was the indecision of the EEOC coupled with continued enforcement of state protective laws by state officials which gave birth to this instant case and others like it. Now that the EEOC has taken a firm position, state enforcement of protective laws has ceased. Three years have passed since the EEOC stated its position, and there can neither be general interest in nor continuing application of any proposition advanced by petitioner.

5. Certiorari Should Be Denied Because The Decision Of The Sixth Circuit Was Correct.

The language of the Civil Rights Act of 1964, as set forth above, makes it discretionary with the District Court to fashion the relief to be granted, if any, and it has universally been so held by those courts considering the question.

Both the District Court and the Court of Appeals carefully reviewed the record in this case and concluded that it would be manifestly unjust to assess back pay against an employer such as General Motors caught between conflicting governmental edicts. In the light of the lack of

clear guidance from the EEOC and the enforcement of state laws by state officials, any employer acted in peril of liability on one side or the other no matter what action the employer took.

Under such circumstances the Sixth Circuit correctly held that the District Court did not abuse its discretion in refusing to award back pay to petitioner.

CONCLUSION

Since the revision of the EEOC Guidelines in 1969 and subsequent judicial decisions, there should be and is no further uncertainty with respect to the relationship between Title VII and state protective legislation. Thus, there is no great or continuing public interest requiring that this Court concern itself with a question which is not likely to reoccur in the future.

The specific provisions of Section 713(b), 42 U.S.C. § 2000e-12(b), flatly prohibit the relief sought by petitioner under the circumstances of the instant case and particularly in view of the specific findings of the District Court as affirmed by the Sixth Circuit.

There is no conflict between the decision in the instant case and the decision of the Ninth Circuit in the *Schaeffer* case for the following reasons: (1) the vast difference in the facts of the cases including the different status of judicial interpretations of the statutes of the two states involved; (2) the differences in findings with respect to good faith reliance on state statutes; (3) the finding of good faith reliance on EEOC Guidelines present in the instant case and absent in the *Schaeffer* case; and (4) the limitation by both Courts of their respective decisions to

the specific facts before them for consideration. On the other hand, the instant case is quite similar to the *LeBlanc* case in which this Court denied certiorari.

The Petition for writ of certiorari to the Sixth Circuit should be denied.

Respectfully submitted,

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APPENDIX

30 Federal Register 14926-15928

December 2, 1965

Chapter XIV—Equal Employment

Part 1604—Guidelines on Discrimination Because of Sex

By virtue of the authority vested in it by Section 713(b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-12(b), the Equal Employment Opportunity Commission hereby amends Chapter XIV of Title 29 of the Code of Federal Regulations to add a new Part 1604, entitled Guidelines on Discrimination Because of Sex. Because the provisions of the Administrative Procedure Act (5 U.S.C. 1003) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date, are inapplicable to these interpretative rules, they shall become effective immediately and shall be applicable with respect to cases presently before or hereafter filed with the Commission.

The new Part 1604 reads as follows:

Introduction. The following guidelines are interpretations of the Commission published pursuant to Section 713(b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-12(b), and §1601.30 of the Commission's regulations, 29 CFR 1601.30.

The Commission has proceeded with caution in interpreting the scope and application of Title VII's prohibition of discrimination in employment on account of sex. We are mindful that there is little relevant legislative history to serve as a guide to the intent of Congress in this area. Also, there is little light in the experience with state statutes. An overly literal interpretation of the prohibition

might disrupt longstanding employment practices required by state legislation or collective bargaining agreements without achieving compensating benefits in progress towards equal opportunity.

These guidelines are an effort to temper the bare language of the statute with common sense and a sympathetic understanding of the position and needs of women workers. Nevertheless, where the plain command of the statute is that there be no artificial classification of jobs by sex, the Commission feels bound to follow it, notwithstanding the fact that such segregation has, in particular cases, worked to the benefit of the woman worker.

Probably the most difficult area considered in these guidelines is the relation of Title VII to state legislation designed originally to protect women workers. The Commission cannot assume that Congress intended to strike down such legislation. Yet our study demonstrates that some of this legislation is irrelevant to present day needs of women, and much of this legislation is capable, in particular applications, of denying effective equality of opportunity to women.

Title VII, which makes suspect any sex distinction in employment, and state protective legislation, which requires special treatment for women, represent competing value judgments which cannot easily be harmonized. Clarification and improvements can however be achieved. We believe it desirable—even essential—that Congress and the state legislatures address themselves to this problem. State legislatures will find archaic provisions in their laws which should be updated. And the Congress may wish to determine how much weight should be given to outmoded laws whose practical effect today is not so much to protect as to disadvantage.

Appendix

The many State commissions on the Status of Women, which have expressed concern that some protective laws may have lost their rationale, may wish to make appropriate recommendations to State legislatures. The Women's Bureau of the Department of Labor, which has been studying these laws, should soon have available a definitive analysis with special emphasis on the relevance of these laws to current technology and women's increasingly important role in society.

Sec.

1604.1 Sex as a bona fide occupational qualification.

1604.2 Separate lines of progression and seniority systems.

1604.3 Discrimination against married women.

1604.4 Job opportunities advertising.

1604.5 Employment agencies.

1604.6 Pre-employment inquiries as to sex.

1604.7 Relationship of Title VII to the Equal Pay Act.

Authority: The provisions of this Part 1604 are issued pursuant to Sec. 713(b), Civil Rights Act of 1964, 78 Stat. 265.

§1604.1 Sex as a bona fide occupational qualification.

(a) The Commission believes that the bona fide occupational qualification exception as to sex should be inter-

preted narrowly. Labels — "Men's jobs" and "Women's jobs"—tend to deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotype characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

(iv) The fact that the employer may have to provide separate facilities for a person of the opposite sex will not justify discrimination under the bona fide occupational qualification exception unless the expense would be clearly unreasonable.

(2) Where it is necessary for the purpose of authenticity of genuineness, the Commission will consider sex to

be a bona fide occupational qualification, e.g. an actor or actress.

(3) Most States have enacted laws or administrative regulations with respect to the employment of women. These laws fall into two general categories:

(i) Laws that require that certain benefits be provided for female employees, such as minimum wages, premium pay for overtime, rest periods or physical facilities;

(ii) Laws that prohibit the employment of women in certain hazardous occupations, in jobs requiring the lifting of heavy weights, during certain hours of the night, or for more than a specified number of hours per day or per week.

(b) The Commission believes that some state laws and regulations with respect to the employment of women, although originally for valid protective reasons, have ceased to be relevant to our technology or to the expanding role of the woman worker in our economy. We shall continue to study the problems posed by these laws and regulations in particular factual contexts, and to cooperate with other appropriate agencies in achieving a regulatory system more responsive to the demands of equal opportunity in employment.

(c) The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception. However, in cases

where the clear effect of a law in current circumstances is not to protect women but to subject them to discrimination, the law will not be considered a justification for discrimination. So, for example, restrictions on lifting weights will not be deemed in conflict with Title VII except where the limit is set at an unreasonably low level which could not endanger women.

(1) An employer, accordingly, will not be considered to be engaged in an unlawful employment practice when he refuses to employ a woman in a job in which women are legally prohibited from being employed or which involve duties which women may not legally be permitted to perform because of hazards reasonably to be apprehended from such employment.

(2) On the other hand, an employer will be deemed to have engaged in an unlawful employment practice if he refuses to employ or promote a woman in order to avoid providing a benefit for her required by law—such as minimum wage or premium overtime pay.

(3) Where state laws or regulations provide for administrative exceptions, the Commission will expect an employer asserting a bona fide occupational qualification pursuant to this paragraph to have attempted in good faith, to obtain an exception from the agency administering the state law or regulation.

§1604.2 Separate lines of progression and seniority systems.

(a) It is an unlawful employment practice to classify a job as "male" or "female" or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee unless sex

is bona fide occupational qualification for that job. Accordingly, employment practices are unlawful which arbitrarily classify jobs so that:

(1) A female is prohibited from applying for a job labeled "male," or for a job in a "male" line or progression; and vice versa.

(2) A male scheduled for layoff is prohibited from displacing a less senior female on a "female" seniority list; and vice versa.

(b) A seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex, or creates unreasonable obstacles to the advancement by members of either sex into jobs which members of that sex would reasonably be expected to perform.

§1604.3. Discrimination against married women.

(a) The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

(b) It may be that under certain circumstances, such a rule could be justified within the meaning of Section 703(e)(1) of Title VII. We express no opinion on this question at this time except to point out that sex as a bona

fide occupational qualification must be justified in terms of the peculiar requirements of the particular job and not on the basis of a general principle such as the desirability of spreading work.

§1604.4 Job opportunities advertising.

(a) Help wanted advertising may not indicate a preference based on sex unless a bona fide occupational qualification makes it lawful to specify male or female.

(b) When a newspaper or other publication classifies such advertising in separate "Male," "Female," and "Male and Female" columns, advertising will most clearly avoid an indication of preference by using the "Male and Female" column. However, advertisers covered by the Civil Rights Act of 1964 may place advertisements for jobs open to both sexes in columns classified "Jobs of Interest —Male" or "Jobs of Interest—Female" provided (1) the advertisement specifically states that the job is open to males and females and (2) substantially the following notice appears in a prominent place on every other page in the section in which the classified advertising appears:

Notice: Many listings in the "male" or "female" columns are not intended to exclude or discourage applications from persons of the other sex. Such listings may be used because some occupations are considered more attractive to persons of one sex than the other. Discrimination in employment because of sex is prohibited by the 1964 Federal Civil Rights Act with certain exception (and by the law of ..... State). Employment agencies and employers covered by the Act must indicate in their advertisement whether or not the listed positions are available to both sexes.

Appendix

Abbreviations, such as M & F, may be used in the advertisement to indicate that males and females may apply, if such abbreviations are readily comprehensible or are explained in the notice.

§1604.5 Employment agencies.

(a) Section 703(b) of the Civil Rights Act specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of sex. The Commission has determined that private employment agencies which deal exclusively with one sex are engaged in an unlawful employment practice, except to the extent that such agencies limit their services to furnishing employees for particular jobs for which sex is a bona fide occupational qualification.

(b) An employment agency that receives a job order containing an unlawful sex specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the sex specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupations qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification.

(c) It is the responsibility of employment agencies to keep informed of opinions and decisions of the Commission on sex discrimination.

Appendix

1604.6 Pre-employment inquiries as to sex.

A pre-employment inquiry may ask "Male————, Female————"; or "Mr., Mrs., Miss," provided that the inquiry is made in good faith for a non-discriminatory purpose. Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification.

§1604.7 Relationship of Title VII to the Equal Pay Act.

(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other prohibitions in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. These interpretations are found in 29 Code of Federal Regulations, Part 800.-119-800.163. Relevant opinions of the Administrator interpret-

ing "the equal pay for equal work standard" will also be adopted by the Commission.

(c) The Commission will consult with the Administrator before issuing an opinion on any matter covered by both Title VII and the Equal Pay Act.

Signed at Washington, D.C., this 24th day of November 1965.

Franklin D. Roosevelt, Jr.,

Chairman.

[F.R. Doc. 65-12874; Filed, Dec. 1, 1965; 8:47 a.m.]

* * *

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August 19, 1969

Title 29—Labor

Chapter XIV—Equal Employment Opportunity Commission

Part 1604—Guidelines on Discrimination Because of Sex

Sex as a Bona Fide Occupational Qualification

By virtue of the authority vested in it by section 713(b) of the Act, 42 U.S.C. §2000e-12(b), the Commission hereby amends Title 29, Chapter XIV, §1604.1(a)(3), (b), and (c) of the Code of Federal Regulations by revoking said paragraphs and substituting in lieu thereof a new §1604.1(b).

Because the provisions of the Administrative Procedure Act (5 U.S.C. 1003) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date, are inapplicable to these interpretative rules, the amendment shall become effective immediately

and shall be applicable with respect to charges presently before or hereafter filed with the Commission.

§1604.1 Sex as a bona fide occupational qualification.

(a) • • •

(3) [Revoked]

(b)(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, or for more than a specified number of hours per day or per week.

(2) The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(c) [Revoked]

(Sec. 713, 78 Stat. 265, 42 U.S.C. 2000e-12)

This amendment is effective upon publication.

Signed at Washington, D.C., this the 15th day of August 1969.

[SEAL] William H. Brown, III,
Chairman.

[F.R. Doc. 69-9840; Filed, Aug. 18, 1969; 8:50 a.m.]

* * *

[FEMALE EMPLOYEES]

§ 4107.42 Working conditions for females. (GC § 1008)

Every person, partnership, or corporation employing females in any factory, workshop, business office, telephone or telegraph office, restaurant, bakery, millinery or dressmaking establishment, or mercantile or other establishments shall provide a suitable seat for the use of each female so employed and shall permit the use of such seats when such female employees are not necessarily engaged in the active duties for which they are employed and when the use thereof will not actually and necessarily interfere with the proper discharge of the duties of such employees. Such seat shall be constructed, where practicable, with an automatic back support and so adjusted as to be a fixture but not obstruct employees in the performance of duty. Such person, partnership, or corporation shall provide a suitable lunchroom, separate and apart from the workroom, and in establishments where lunchrooms are provided, female employees shall be entitled to not less than thirty minutes for meal time. In any such establishment in which

it is found impracticable to provide a suitable lunchroom, female employees shall be entitled to not less than one hour for meal time during which hour they shall be permitted to leave the establishment. No restriction as to hours of labor shall apply to canneries or establishments engaged in preparing for use perishable goods during the season they are engaged in canning their products.

No person, partnership, or corporation, or agent thereof, shall violate this section.

§ 4107.43 Occupations in which employment of females prohibited.

The employment of females in the following occupations or capacities is prohibited:

Crossing watchman, section hand, express driver, metal moulder, bell hop, taxi driver except between the hours of six a. m. and nine p. m., gas or electric meter reader, as workers in blast furnaces, smelters, mines, or quarries except in the offices thereof, in shoe shining parlors, bowling alleys as pin setters, poolrooms, barrooms and saloons or public drinking places which cater to male customers exclusively, in delivery service on motor propelled vehicles of over one ton capacity, in operating freight or baggage elevators if such elevators and the doors thereof are not automatically or semi-automatically controlled, in baggage handling, freight handling, trucking, and handling by means of hand trucks heavy materials of any kind, or in employments requiring frequent or repeated lifting of weights over twenty-five pounds.

§ 4107.45 Definitions. (GC § 1008-3)

As used in sections 4107.42, 4107.45 to 4107.53, inclusive, and 4109.22 of the Revised Code:

(A) "Employ" includes permit or suffer to work.

(B) "Employer" includes every person, firm, corporation, partnership, stock association, agent, manager, representative, or foreman, or other person having control or custody of any employment, place of employment, or of any employee.

(C) "Day" includes a calendar day from midnight to midnight; provided, that anything in this section or section 4107.46 of the Revised Code to the contrary, at least ten hours must elapse between the end of one day's work and the beginning of the next day's work; provided that except as otherwise provided in section 4107.46 of the Revised Code, the work during any one day does not exceed eight hours and the work during any one calendar week does not exceed forty-eight hours.

§ 4107.99 Penalties.

(A) Whoever violates section 4107.09 of the Revised Code shall be fined not less than fifty nor more than one hundred dollars for each day after the expiration of the time designated in the notice mentioned in such section until the alterations or additions have been made. The faliure to comply with such notice constitutes a single offense, with the amount of the fine dependent upon the number of days the failure continues; in a subsequent prosecution as provided in such section, the fine shall be computed upon the number of days intervening between the date of the former conviction and the filing of the subsequent affidavit.

(B) Whoever violates division (D) of section 4107.13 of the Revised Code shall be fined not less than fifty nor more than one hundred dollars for a first offense; for each sub-

sequent offense such person shall be fined not less than two [hundred] nor more than five hundred dollars.

(C) Whoever violates section 4107.14 of the Revised Code shall be fined not less than ten nor more than one hundred dollars.

(D) Whoever violates section 4107.19 of the Revised Code shall be fined not more than twenty-five dollars for a first offense; for each subsequent offense such person shall be fined not more than one hundred dollars.

(E) Whoever violates section 4107.20 or 4107.21 of the Revised Code shall be fined not less than fifty nor more than one hundred dollars or imprisoned not less than thirty nor more than sixty days, or both.

(F) Whoever violates section 4107.24 of the Revised Code shall be fined not less than one hundred nor more than three hundred dollars.

(G) Whoever violates section 4107.25 of the Revised Code shall be fined not less than one hundred nor more than two hundred dollars for a first offense; for each subsequent offense such person shall be fined not less than five hundred nor more than one thousand dollars.

(H) Whoever violates section 4107.26 or 4107.27 of the Revised Code shall be fined not less than one hundred nor more than one thousand dollars.

(I) Whoever violates section 4107.30 of the Revised Code shall be fined not less than fifty dollars for a first offense; for each subsequent offense such person shall be fined not less than one hundred nor more than one thousand dollars.

(J) Whoever violates section 4107.37 of the Revised Code shall be fined not less than five hundred nor more than

one thousand dollars or imprisoned not less than thirty days nor more than one year, or both.

(K) Whoever violates section 4107.38 of the Revised Code shall be fined not less than ten nor more than one hundred dollars.

(L) Whoever violates section 4107.39 of the Revised Code shall be fined not less than twenty-five nor more than one hundred dollars for a first offense; for a second offense such person shall be fined not less than two hundred nor more than three hundred dollars; for each subsequent offense such person shall be imprisoned not less than thirty nor more than ninety days.

(M) Whoever violates section 4107.40, 4107.41, 4107.42, or 4107.43 of the Revised Code shall be fined not less than twenty-five nor more than two hundred dollars.

(N) (1) Whoever violates section 4107.46 of the Revised Code shall be fined not less than twenty-five nor more than two hundred dollars or imprisoned not more than sixty days, or both. Whenever any person has been notified by the chief of the division of workshops and factories or his authorized representative, or by the service of a summons in a prosecution, that he is violating such section, such person shall be fined not less than twenty-five nor more than two hundred dollars or be imprisoned not more than sixty days, or both, for each day that such violation has continued after such notification. The employment of any female in violation of such section constitutes a separate offense with respect to each female so employed.

(2) Whoever violates section 4107.48, 4107.49, or 4107.52 of the Revised Code shall be fined not less than twenty-five nor more than two hundred dollars or imprisoned not

more than sixty days, or both. Whenever any person has been notified by the chief of the division of workshops and factories or his authorized representative that he is violating such sections, and has been given a reasonable time in which to remedy the conditions which constitute such violation, he shall be fined not less than twenty-five nor more than two hundred dollars or imprisoned not more than sixty days, or both, for each day that such violation has continued after the expiration of the time allowed by the chief or his authorized representative for remedying such conditions.

No person shall be imprisoned for more than one year at one time for violation of sections 4107.45 to 4107.53, inclusive, of the Revised Code.

(O) Whoever violates section 4107.61 of the Revised Code shall be fined not less than twenty nor more than fifty dollars for a first offense; for each subsequent offense such person shall be fined not less than fifty nor more than two hundred dollars or imprisoned not more than ten days.

Certificate Of Service

We hereby certify that three copies of the within brief for the Respondent, General Motors Corporation were this day served by mail on the following:

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By /s/ RUSSELL J. THOMAS, JR.
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